ROZILA MOHAMED

v.

AMERICAN EXPRESS (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[BANKRUPTCY NO: D3-29-2298-98]
9 SEPTEMBER 1999

BANKRUPTCY: *Receiving order - Amount due as at hearing of bankruptcy petition below statutory minimum - Whether receiving order may be made - Whether bankruptcy petition ought to be set aside - Whether receiving order may be made if amount exceeds statutory minimum notwithstanding that amount differs from that stated in bankruptcy notice - Bankruptcy Act 1967, s. 5(1)(a)*

A bankruptcy notice for the sum of RM17,789.89 was served on the judgment debtor. However, at the time of hearing of the bankruptcy petition, the balance owing was below the RM10,000 statutory minimum prescribed by s. 5(1) of the Bankruptcy Act 1967 since the judgment debtor had made certain payments in the meantime. The issue was whether the bankruptcy petition ought to be set aside.

Held:

[1] The amount still due and outstanding as at the hearing of the bankruptcy petition must be considered. If the amount exceeds the statutory minimum, a receiving order may still be made notwithstanding that the amount due at the date of hearing differs from the amount in the bankruptcy notice, the latter amount being correct at the time the notice was served. If the amount due at the time of hearing is less than the statutory minimum, the bankruptcy petition should not be allowed as it would breach s. 5(1)(a) of the Bankruptcy Act 1967.

[Bankruptcy petition set aside.]

Case(s) referred to:
In Re A Debtor [1908] 2 KB 684 ***(dist)***
In Re Child [1892] 2 QB 77 ***(dist)***
Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd [1991] 3 CLJ 1817 ***(foll)***
Re Patel (a Debtor) [1986] 1 All ER 522 ***(refd)***
Re Saloma Co, ex parte Ipoh Radio Co [1963] 29 MLJ 46 ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(1)(a)

For the Appelant - Muhamad Nazri; M/s Isharidah, Ho, Chong & Menon
For the respondent - Harcharan Singh; M/s Harcharan S Sidhu & Assoc

Reported by S Dharmendran

JUDGMENT

Abdul Wahab Patail J:

This is an appeal by a judgment debtor, Rozila binti Mohamed, against the decision of the senior assistant registrar, rejecting her application to set aside a bankruptcy notice dated 18 July 1998 upon the grounds:

1. that she had not defaulted on the mode of settlement agreed between the parties;

2. the amount sought by the judgment creditor is less than the statutory amount in s. 5(1) of the Bankruptcy Act 1967.

The judgment debtor had owed RM17,789.89. After an exchange of letters, it was agreed by a letter of 29 July 1998 that the judgment debtor was to make a payment of RM10,000 on 30 August 1998, and the balance by way of three equal payments by post-dated cheques dated the 7th of the relevant month, all of which cheques to be deposited with the judgment creditor's lawyers within seven days of 29 July 1998, failing which the solicitors would proceed with bankruptcy proceedings.

The judgment debtor failed to comply but instead paid directly to the judgment creditor the sum of RM10,000 on 29 August 1998. It was also agreed then that the balance of RM7,789.89 would be paid by way of three monthly installments commencing 29 September 1998 until 29 November 1998. The first installment payment was paid directly to the judgment creditor on 11 September. It was accepted. The two subsequent installments were never paid.

The judgment creditor's solicitors in the meantime had served upon the judgment debtor a bankruptcy notice on 24 August 1998 for the sum of RM17,789.89. It is common ground that the balance of RM5193.26 is below the requirement of s. 5(1) of the Bankruptcy Act 1967. For that reason the judgment creditor's solicitors seeks to proceed with the bankruptcy notice which stated the correct amount as at the date it was served, and the solicitors informed the court that the judgment creditor is willing to pay the amounts already received by the judgment creditor to the official assignee.

The solicitors for the judgment debtor cited *Re Saloma Co, ex parte Ipoh Radio Co.* [1963] 29 MLJ 46 a case where the judgment debtor had made a payment of RM700 before the bankruptcy notice was served, with the result that the sum stated on the notice did not state the actual amount due. It was held that the bankruptcy notice was defective and void. The solicitors for the judgment creditor sought to distinguish the case on the basis that in the instant case, the sum of RM17,789.89 was correct on the date the bankruptcy notice was served.

In *Re Saloma Co, ex parte Ipoh Radio Co,* the learned judge referred to *In re Child* [1892] 2 QB 77, in which Vaughan Williams J had said:

> It can scarcely, I think, have been the intention of the legislature that a judgment debtor should be liable to be served with a bankruptcy notice claiming from him a sum which is not due, inasmuch as it has been paid by him and accepted by the judgment creditor in reduction of the judgment debt.
>
> I think they shew a clear intention that a judgment creditor, in serving a bankruptcy notice, shall deal with a sum which is really due in respect of the judgment debt, and with that sum alone.

The learned judge referred also to *Cozens-Hardy MR in In re a Debtor* [1908] 2 KB 684 who said:

> The amount in the bankruptcy notice was not due. There was a mistake in the calculation of interest ... It is said that that is a formal defect which can be set right under section 143, sub-section 1, of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him ... It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of section 143.

These cases did not directly address the question of the outstanding sum being less than the amount in the bankruptcy notice or the statutory limit on the date of hearing although the sum was correct at the time of service of the bankruptcy notice. Neither solicitor however referred to *Re Loh Kok Huah ex p Ban Hin Lee Bank Bhd* [1991] 3 CLJ 1817; [1992] 1 MLJ 489 where Mohamed Dzaiddin J (as he then was) had occasion to say:

> Thirdly, in my opinion, where the judgment debt on which the bankruptcy petition is founded has, by the date of the hearing of the petition, been substantially reduced, this court can still make a receiving order unless the debt was less than the statutory minimum of RM2,000 since on the true construction of s. 6(2) read with s. 5(1) (a) of the Act it is necessary that a debt exceeding the statutory minimum of RM2,000 is still due and owing to the bank at the date of the hearing of the petition (see *Re Patel (a debtor)*).

Re Patel (a Debtor) is reported at 1986 1 All ER 522. It is, in my view, essential that a court must consider the amount still due and outstanding as at the hearing of the petition. If the amount exceeds the statutory minimum, a receiving order may still be made even though the actual amount due and outstanding at the date of hearing differs from the amount in the bankruptcy notice even though it was correct at the time the notice was served. If the amount then is less than the statutory minimum, the petition should not be allowed as it would breach s. 5(1)(a) of the Bankruptcy Act 1967. In the circumstances I had allowed the appeal and set aside the bankruptcy petition.